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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY TERRY RICHARD,

Defendant and Appellant.

E053172

(Super.Ct.No. RIF153876)

OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge.

Affirmed as modified.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and James D. Dutton, Michael T. Murphy and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Anthony Terry Richard was convicted of attempted murder, attempted robbery, and assault with a firearm, and it was found true that he personally used a firearm. In a bifurcated proceeding, the court determined that defendant had suffered a prior “strike” conviction. Defendant moved for and was granted a new trial; however, it was limited to the allegations that he personally discharged a firearm in the commission of the attempted robbery and attempted murder. He was sentenced to state prison for an indeterminate term of 14 years to life, plus a consecutive determinate term of 16 months. He appeals, contending the trial court erred in failing to grant his motion for new trial in its entirety, and in allowing the prosecutor to amend the accusatory pleading during trial.

I. PROCEDURAL BACKGROUND AND FACTS

On December 1, 2009, Engelberto Gonzalez (the victim) was alone, tending his jewelry store on Mission Boulevard in Riverside. He was armed with a gun. Two young Black men entered the store, and one of the men, pointing a gun at the victim, yelled, “This is a robbery.” The suspect with the gun fired, and as the victim returned fire, the two suspects ran towards the exit.

On December 4, 2009, a felony complaint was filed charging defendant with assault with a firearm (count 1) along with a personal use enhancement (Pen. Code,¹ §§ 245, subd. (a)(2), 1192.7, subd. (c)(8), 12022.5, subd. (a)); attempted robbery (count 2), along with a personal use enhancement (§§ 664, 211, 1192.7, subd. (c)(8), 12022.53,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

subd. (c)); and a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). On February 25, 2010, an amended felony complaint was filed charging defendant with attempted murder (count 1), along with a personal use enhancement (§§ 664, 187, subd. (a), 1192.7, subd. (c)(8), 12022.53, subd. (c)); assault with a firearm (count 2), along with a personal use enhancement (§§ 245, subd. (a)(2), 1192.7, subd. (c)(8), 12022.5, subd. (a)); and a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

The preliminary hearing was held on April 1, 2010. At the hearing, the prosecutor moved to dismiss both firearm allegations on the ground that it had been determined that defendant was not the shooter. The only witness to testify at the hearing was the investigator, John Negrete. He stated the victim reported that two Black males entered his jewelry store and one pulled out a gun and fired a round. The investigator said he had reviewed the store's surveillance video, and it did not appear that defendant was the suspect who had been holding the gun. The victim could not identify defendant as one of the suspects; however, two witnesses, Clay Presley and Cynthia Mendoza, identified defendant as one of the males they saw outside the victim's store. Presley believed he saw defendant holding a gun as he ran from the store. Mendoza did not see any guns but believed she saw defendant put something, "the weapon," in his waistband. The investigator also testified that the Honda Civic in which the two males used to flee belonged to defendant's ex-girlfriend, who said she had loaned the car to defendant that morning.

Following the preliminary hearing, an information was filed on April 14, 2010. It charged defendant with attempted murder and alleged that he was a principal knowing that another principal was armed with a handgun (§§ 664, 187, subd. (a), 12022, subd. (a)(1); count 1); assault with a firearm, and that he was a principal knowing that another principal was armed with a handgun (§§ 245, subd. (a)(2), 12022, subd. (a)(1); count 2); and a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). Later, on July 19, 2010, prior to trial, the prosecutor filed an amended information adding a charge of attempted robbery (§§ 664, 211) as count 2 and moving the assault with a firearm charge (§ 245, subd. (a)(2)) to count 3. The amended information continued to allege that a principal was armed with a firearm (§ 12022, subd. (a)(1)) as to all counts, and that defendant suffered a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

At trial, which began on July 26, 2010, the victim was unable to identify defendant as one of his assailants; however, he testified that the suspect with the gun wore a tan or beige-colored shirt and a hat. Presley, whose law office is located 30 feet from the victim's store and who was one of the witnesses, testified that he saw two men running away from the jewelry store and that defendant was wearing a tan-colored shirt, holding a chrome-colored gun. Presley identified defendant as one of the men. He had previously picked defendant from a "photo-lineup" during the investigation. Mendoza, the other witness, saw two Black males running from the jewelry store towards her and getting into a Honda Civic. She identified defendant as the passenger, who was wearing a light olive

green or tan-colored shirt, and shoving a “silver like gun” in his waistband as he got inside the car. She wrote down the Civic’s license plate number, which she later provided to the police. Mendoza also picked defendant from a “photo-lineup” as the suspect running with the gun. From the license plate number, police identified Shayna Cover, defendant’s ex-girlfriend, as the owner of the Civic. Cover testified that defendant had borrowed her Civic on the morning of the attempted robbery.

Following Mendoza’s testimony, the prosecutor informed the court there was a reason to amend the information to conform to proof in the case. He noted the original pleading charged defendant as the actual shooter; however, it was later changed to allege that one of the principals was armed, because the prosecution was concerned they may not have enough evidence to prove the charge. The next day, the prosecution moved to amend the information “to conform to proof” by adding allegations that defendant personally discharged a firearm in counts 1 and 2 (§ 12022.53, subd. (c)) and personally used a firearm in count 3 (§ 12022.5, subd. (a)). Defense counsel objected on the ground there was insufficient proof to warrant the amendment, but the trial court permitted it.

Defendant presented an alibi defense through other witnesses. He also argued that no fingerprints at the jewelry store were identified as being his. Further, there were no results submitted from the swabs taken from his hands for analysis regarding gunshot residue (GSR). Likewise, neither of the two hats found at the crime scene produced any DNA results linking them to him.

At the conclusion of the presentation of the evidence, the prosecutor filed a second amended information containing the personal use allegations. The jury found defendant guilty as charged and found the firearm allegations true.

Defendant moved for a new trial. He argued he had inadequate notice that the prosecution would proceed on the theory that he was the shooter, which adversely impacted his ability to defend against the firearm allegations, as well as the charged offenses. In response, the prosecutor argued that the preliminary hearing provided defendant with adequate notice that he could be charged as the shooter, citing statements by Presley and Mendoza that they may have seen defendant with a gun outside the jewelry store.

The trial court granted the new trial motion with respect to the personal use enhancements attached to counts 1 and 2 only. In addressing the charged offenses, the court stated: “[T]here is ample evidence that [defendant] was there at the scene of the crime and that he was one of the two perpetrators of the crime.” The court continued: “[T]here were two very solid witnesses, you know, that saw him come out of the jewelry store and [identified] him. I thought they were very solid, very good witnesses and I think there’s ample evidence that the jury can use to base its finding of a verdict of guilty in that instance. [¶] I think the question of who was the shooter is a much more difficult question. And the Court is bothered by the fact that, you know, there was a GSR test done but, apparently, we don’t know [what] the results are. And the Court feels that if [defendant] had been charged as a shooter then at least the defense could have requested

the GSR test results [¶] . . . [¶] . . . or filed a motion.” The court opined that the prosecutor would not have gone “forward with the case [¶] . . . [¶] . . . if it came back with a zero reading on the GSR.” The trial court also agreed to reconsider its ruling with respect to the remaining allegations if the GSR test results were negative.

II. AMENDING THE ACCUSATORY PLEADING DURING TRIAL

In two separate arguments, defendant challenges the trial court’s decision to allow the prosecutor to amend the information during the course of the trial and change its theory from defendant being a nonshooting perpetrator to him being the shooter. In his first argument, defendant faults the court for granting the new trial only as to the discharge allegations added to counts 1 and 2. He argues the court “erred by failing to grant a new trial on all the charges and allegations.” In his second argument, defendant contends the trial court erred in allowing the amendment but not providing “the defense with some remedy for the lack of notice, such as exclusion of the evidence, a continuation of the case, or a mistrial.” To the extent the second issue is deemed waived due to failure to lodge an adequate objection, defendant “submits his attorney rendered constitutionally inadequate assistance.”

A. Motion for New Trial

1. Defendant’s Argument

Section 1181 authorizes the trial court to grant a new trial under nine specific grounds. In moving for a new trial, defendant claimed inadequate notice of the charging allegations. Although this is not one of the specific grounds listed, he argued that the

lack of notice deprived him of his ability to present a defense. On appeal, defendant contends “the lack of notice contention would qualify as a nonstatutory ground for a new trial, much as a claim of ineffective assistance of counsel would [because] both . . . fall within the Sixth Amendment’s scope.” (*People v. Fosselman* (1983) 33 Cal.3d 572, 582 [defendant may bring a motion for a new trial based on constitutional grounds not specified in the new trial statute].) We agree. “Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them.’ [Citation.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1205.)

2. Standard of Review

In the context of a statutory motion for new trial, the motion rests within the discretion of the trial court. (*People v. Williams* (1988) 45 Cal.3d 1268, 1318.) However, “the proper scope of review of the trial court’s ruling on a nonstatutory motion based upon an allegation of denial of constitutional rights is not so simple.” (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.) It requires a two-step process wherein we review the record to determine whether substantial evidence supports the trial court’s factual findings, and then independently review the court’s decision as to whether defendant’s constitutional rights were violated. (*Id.* at pp. 724-725; *People v. Uribe* (2011) 199 Cal.App.4th 836, 855-858.)

3. Analysis

According to defendant, “neither the accusatory pleading nor the preliminary hearing gave the defense adequate notice that the prosecutor would proceed on the theory [defendant] was the shooter.” More specifically, he argues there was no rationale for the trial court to limit the scope of the due process violation to the firearm allegations in counts 1 and 2. We disagree.

As previously noted, initially defendant was charged as being the shooter. Nonetheless, the prosecution relied on the investigator’s review of the videotape from the jewelry store and opted to simply charge defendant as being a principal, knowing that another principal was armed. The prosecution continued to limit the charging allegations even though the investigator testified at the preliminary hearing that witnesses identified defendant as possessing a gun while exiting the jewelry store and getting into the Honda. At trial, more evidence of defendant’s possession of the gun was introduced. Witnesses placed defendant at the jewelry store at the time of the robbery. Regarding his possession, witnesses Presley and Mendoza testified to seeing defendant in possession of the gun. They described defendant as wearing a tan or olive green shirt. While the victim could not identify defendant as the shooter, he did testify that the shooter was wearing a tan shirt. While the videotape affirmed defendant’s presence at the jewelry store, it did not affirm his possession of the gun. There was no GSR evidence presented. Moreover, defense witnesses testified that defendant was at a Shell gas station approximately nine minutes after the robbery. Although the defense evidence raised an

issue as to whether defendant was actually one of the two suspects who had assaulted and attempted to rob and/or murder the victim, that created a question of fact for the jury to decide. It did, finding defendant guilty. There was sufficient evidence to support the trial court's factual findings which denied the new trial motion as to the substantive charges.

In contrast, regarding the firearm enhancement allegations, defendant was harmed by the lack of notice that he would be charged with being the shooter. There was no GSR evidence and there was conflicting evidence as to which suspect was the shooter. While the outside witnesses claimed that it was defendant, the investigator claimed otherwise based on his review of the videotape. However, because the enhancements did not charge defendant as being the shooter, the defense did not need to be as diligent in seeking the GSR evidence, which may have exonerated defendant. Given the conflicting facts, the trial court was correct in choosing to limit a new trial to the firearm use enhancements attached to counts 1 and 2.

In a related argument, defendant points out that the trial court failed to include the firearm use enhancement attached to count 3 in granting a new trial on the enhancements. Given the court's reasoning, we agree that "it was not logical for [the court] to distinguish the firearm use allegation in count [3] from the allegations in counts [1 and 2]." Thus, we will order the trial court to amend its ruling to include a new trial as to the firearm use enhancements attached to all three counts.

Next we consider the trial court's decision that defendant's constitutional rights were only violated as to the firearm use enhancements and not the substantive charges.

For the most part, defendant focuses his argument on the shift in theory from defendant not being the shooter to defendant being the shooter. However, the court granted a new trial as to the issue of defendant being the shooter. Regarding the substantive charges, there was no major shift in theory. As the People point out, defendant was on notice that the prosecution intended to prove that defendant and another suspect committed the charged offenses. From the time of the preliminary hearing, “and presumably from the time when defense counsel received the police reports in this case,” defendant was aware that there were two witnesses who had identified him as one of the suspects running from the jewelry store. To that end, the defense presented evidence which called into question the validity of the witnesses’ identification of him as one of the suspects. The defense theory was that defendant was nowhere near the jewelry store at the time of the attempted robbery/assault. Rather, he was at a Shell gas station dealing with his car that had broken down. The change in the prosecution’s theory (from nonshooter to shooter) did not alter the substantive charges. Thus, there was no violation of defendant’s constitutional rights such that a new trial on the substantive charges should have been granted.

B. Allowing the Amendment

Defendant contends the trial court erred in allowing the amendment and by not providing “the defense with some remedy for the lack of notice, such as exclusion of the evidence, a continuation of the case, or a mistrial.” The primary focus of the amended pleading was to identify defendant as the shooter. As we have already noted, as to the enhancements, the remedy for the lack of notice was to grant a new trial on the gun use

enhancements attached to counts 1 and 2; and, we have added the enhancement attached to count 3 as also requiring a new trial. As for the substantive charges, the change from defendant being the nonshooter to defendant being the shooter did not alter the charging allegations for which defendant's defense was based, i.e., calling into question the evidence which identified and placed him at the scene of the jewelry store at the time of the attempted robbery. Accordingly, the trial court did not err in providing defendant with some remedy for the lack of notice.

III. DISPOSITION

The order granting a new trial is amended to include a new trial on the gun use enhancements attached to counts 1, 2, and 3. In all other respects, the judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.